

# Decision Notice



Decision 118/2008 Mr Brian Frew and Falkirk Council

Correspondence between the Council and UDV Guinness

Reference No: 200800665

Decision Date: 18 September 2008

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**Kevin Dunion**

Scottish Information Commissioner

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## Summary

Mr Frew requested from Falkirk Council (the Council) copies of invoices and contractual agreements regarding the transportation and storage of certain seized goods, along with and copies of correspondence between Falkirk Trading Standards and UDV Guinness concerning a related case. The Council responded by stating that information was not held in relation to the transportation and storage of the seized goods and that correspondence between the Council and UDV Guinness was being withheld in terms of section 36(1) of FOISA (being information in respect of which a claim of confidentiality of communications could be maintained in legal proceedings). Following a review, Mr Frew remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that Falkirk Council had dealt with Mr Frew's request for information in accordance with Part 1 of FOISA. He did not require Falkirk Council to take any action.

## Relevant statutory provisions and other sources

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Freedom of Information (Scotland) Act 2002 (FOISA) sections: 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions) and 36(1) (Confidentiality).

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

## Background

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1. On 15 February 2008, Mr Frew wrote to the Council requesting the following information (all relating to the seizure of goods from his business):
  - a. A copy of the haulage invoice issued to the Council for the transportation of his stock to a named warehouse, along with proof of payment;
  - b. A copy of the invoice issued to the Council from the owners of the warehouse for the storage of his stock, along with proof of payment;
  - c. A copy of the contractual agreements between the Council and any companies its Trading Standards Service might use for storing seized goods;



- d. A copy of all correspondence between Falkirk Trading Standards and UDV Guinness from the time the Fiscal's office said that all proceedings against W & S Frew were being dropped.
2. The Council responded on 17 March 2008, intimating that no information was held that would meet Mr Frew's requests a, b and c. Although it held information falling within the ambit of his request d, the Council argued that this was exempt in terms of section 36(1) of FOISA, on the basis that it was information in respect of which a claim of confidentiality of communications could be maintained in legal proceedings.
3. On 27 March 2008, Mr Frew wrote to the Council requesting a review of its decision to withhold information in terms of section 36(1), in other words its response to his request d.
4. The Council notified Mr Frew of the outcome of its review on 21 April 2008, upholding its original decision and confirming that in doing so it had considered the public interest.
5. On 30 April 2008, Mr Frew wrote to the Commissioner's Office, stating that he was dissatisfied with the outcome of the Council's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Mr Frew had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

## Investigation

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7. On 17 May 2008, the Council was notified in writing that an application had been received from Mr Frew and asked to provide the Commissioner's Office with any information which had been withheld from the applicant. The Council responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted the Council, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, the Council was asked to justify its reliance on the exemption in section 36(1) of FOISA.
9. The Council responded, confirming its reliance on section 36(1) for all of the withheld information with the exception of certain documents which it accepted on further consideration as being within Mr Frew's knowledge or otherwise accessible to him already. Copies of these latter documents were provided to Mr Frew in the course of the investigation and the information in them will not be considered further in this decision.



10. The Council also confirmed that the Procurator Fiscal had indicated he did not intend to prosecute on or around 21 December 2001. All of the relevant correspondence is from some time after that date.

## Commissioner's analysis and findings

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11. In coming to a decision on this matter, the Commissioner has considered all of the information and the submissions that have been presented to him by both Mr Frew and the Council and is satisfied that no matter of relevance has been overlooked.
12. It is clear both in the applicant's request for review and in his application to the Commissioner that he was dissatisfied only with the Council's application of section 36(1) of FOISA in response to his request d, and not with the Council's assertion that the remaining information he had requested was not held. Therefore, this decision will consider the Council's handling of Mr Frew's request d only.

### Section 36(1) of FOISA

13. The Council applied section 36(1) to the remaining withheld information, stating that its confidentiality came from the fact that it was correspondence in contemplation of or in the course of legal proceedings. It identified two sets of actual or threatened legal proceedings to which the information related.
14. The Council further advised that the correspondence in question was between lawyers for the owners of trade marks relating to the seized goods and lawyers for the Council, and suggested that had the applicant sought this correspondence through either of the court proceedings then such a request could have been resisted.
15. The exemption in section 36(1) of FOISA exempts from disclosure information in respect of which a claim of confidentiality of communications could be maintained in legal proceedings. Among the types of communication which fall into this category are those which are subject to legal professional privilege. One aspect of legal professional privilege is litigation privilege, which covers documents created in contemplation of litigation (also known as communications *post litem motam*).
16. Communications *post litem motam* are granted confidentiality in order to ensure that any person/organisation that is involved in a court action can prepare their case as fully as possible without the risk that their opponent will gain access to the material generated by their preparations. The privilege covers communications at the stage when litigation is pending or in contemplation. Whether a particular document was prepared in contemplation of litigation will be a question of fact, the key question often being whether litigation was actually in contemplation at a particular time.



17. Litigation privilege will apply to documents created by the party to the potential litigation, expert reports prepared on their behalf and legal advice given in relation to the potential litigation: the communication need not involve a lawyer to qualify. The litigation contemplated need never actually happen for the privilege to apply, and it will continue to apply after any litigation has been concluded
18. In this particular case, the Council referred to a letter it had received from Mr Frew dated 15 February 2002. From this letter, it does appear to the Commissioner that Mr Frew was at the time contemplating a statutory claim for compensation in relation to the seized goods. All of the withheld documents are items of correspondence dating from after this letter, the first of them referring to Mr Frew's intention to make the compensation claim. The correspondence considers aspects of the potential claim in which the trade mark owners and the Council both appear to have had an interest.
19. The Commissioner has considered the timing and content of the correspondence and is satisfied that it was entered into in contemplation of litigation against it, which appeared at the time to be under serious consideration by a third party. In the circumstances, therefore, the Commissioner is satisfied that the withheld information is exempt by virtue of section 36(1) of FOISA.

#### *Public Interest Test*

20. The exemption in section 36(1) is a qualified exemption, which means that its application is subject to the public interest test set out in section 2(1)(b) of FOISA. Where a public authority finds that this exemption applies to information that has been requested, it must go on to consider whether, in all circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.
21. In relation to the public interest, the Council argued that where parties were either contemplating taking court action or were threatened by court action, there was a very strong public interest in allowing those parties to protect their legitimate interests as best they could. In an adversarial judicial process, confidentiality of communications was a necessary requirement for the system to work. Natural justice allowed public authorities the same legal rights as any other person. The Council submitted that it would be a very exceptional situation where a counter public interest argument would prevail over this legal protection. Since no contrary public interest had been advanced in this case which might defeat the strong public interest in protecting the integrity of the judicial process and the underpinning concept of natural justice, the Council believed the public interest supported the information being withheld.
22. Mr Frew appears to be of the view that disclosure would be in the public interest in order to expose wrong doing on the part of the Council, although he has not expanded on this.



23. As the Commissioner has noted in a number of previous decisions, the courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds. Many of the arguments in favour of maintaining confidentiality of communications were discussed in a House of Lords case, *Three Rivers District Council and others v Governor and Company of the Bank of England (2004) UKHL 48*, and the Commissioner will apply the same reasoning to communications attracting legal professional privilege in general. Consequently, while he will consider each case on an individual basis, he is likely to order the release of such communications in highly compelling cases only.
24. In this case, while accepting a general public interest in authorities being open to scrutiny and accountable for their actions, the Commissioner can see no more specific public interest in the disclosure of this particular information. On the other hand, as indicated above, there is a clear and compelling public interest in allowing the Council (like any other party to potential legal proceedings) to prepare fully for anticipated litigation without these preparations being open to examination by the other party. On balance, therefore, the Commissioner is satisfied in all the circumstances that any public interest in disclosure is outweighed by the public interest in maintaining the exemption in section 36(1).
25. The Commissioner accepts, therefore, that the Council was correct to withhold information from Mr Frew under section 36(1) of FOISA.

## DECISION

The Commissioner finds that Falkirk Council acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in dealing with the information request made by Mr Frew.



## Appeal

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Should either Mr Frew or Falkirk Council wish to appeal against this decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision notice.

**Kevin Dunion**  
**Scottish Information Commissioner**  
**18 September 2008**



## Appendix

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### Relevant statutory provisions

#### Freedom of Information (Scotland) Act 2002

##### 1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.
- (6) This section is subject to sections 2, 9, 12 and 14.

##### 2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –
  - ...
  - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

##### 36 Confidentiality

- (1) Information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information.

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